



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-811

Appeal P-9400394

Ministry of Natural Resources



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Natural Resources (the Ministry) received a request for access to copies of all records in its possession relating to wildlife rehabilitation and the keeping of wild animals in captivity. The Ministry located seven records which were responsive to the request and denied access to five of them, in whole or in part, relying on the following exemptions contained in the Act:

- advice or recommendations - section 13
- priority of publication - section 18(1)(b)
- proposed policies of the Ministry - section 18(1)(g)

The records at issue in this appeal consist of draft policies and procedures prepared in anticipation of the enactment of Bill 162. This piece of legislation, which was introduced to the Legislature in November 1991 and has received first reading, amends the current Game and Fish Act with new provisions governing game farming, wildlife rehabilitation, falconry, zoos and the trailing and training of hounds.

The requester appealed the decision of the Ministry to deny access to the records. A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from both parties.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Ministry has claimed that section 13(1) of the Act applies to Records 1, 5, 6 and 7. This provision states that:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

Record 1 is a 208-page document entitled "Wildlife Rehabilitation Technical Manual". The Ministry granted access to all but six pages of the manual. A section entitled "Mandatory Procedures" has been withheld from disclosure. These procedures outline the proposed criteria for the selection of wildlife custodians as envisaged by Bill 162, as well as the steps to be taken by these individuals in the course of their care of sick or injured animals.

In its representations, the Ministry submits that the information contained in the undisclosed portion of Record 1 consists of "policy and program options, and recommendations on proposed programs and policies used to administer Bill 162". I cannot agree. I find that Record 1 is a procedural manual to be used by wildlife custodians during the course of their treatment of wild animals within the statutory framework of Bill 162. This information cannot be characterized as "advice or recommendations" within the meaning of section 13(1) of the Act as it is not intended to be considered by its recipient as part of a deliberative process.

Similarly, the undisclosed portion of Record 5, entitled "Falconry and Captive Raptor Technical Manual", is concerned with the care of birds of prey held in captivity under the regime addressed by Bill 162. I find that section 13(1) has no application to this record.

Record 6 is a 70-page document entitled "Proposed Policy and Program for Wildlife in Captivity in Ontario". Pages 9 to 12, 17 to 26, 33 to 41, 45 to 51, 57 to 65 and 68 to 70 were withheld from disclosure under section 13(1). These portions of Record 6 set forth policy options available to cover five separate program areas along with, in some cases, a recommended course of action for the Ministry to take.

I find that the recommendations found on pages 11 and 12, and the heading and paragraph entitled Rationale on page 60 qualify as advice and recommendations and are properly exempt from disclosure. I have highlighted these portions of pages 11, 12 and 60 of Record 6 on the copy provided to the Ministry's Freedom of Information and Privacy Coordinator with a copy of this order.

The remaining information in Record 6 consists of general policy statements and does not fit within the section 13 exemption. These undisclosed portions of Record 6 will be further addressed in my discussion of section 18(1)(g) of the Act.

Record 7, entitled "Principles and Interpretations of Proposed Policy and Program for Wildlife in Captivity", is a restatement of the policy considerations described in Record 6. For the reasons discussed above, I find that section 13(1) has no application to this record.

In summary, I find that only those portions of pages 11, 12 and 60 of Record 6 which are highlighted on the copy provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order qualify for exemption under section 13 of the Act.

PRIORITY OF PUBLICATION

The Ministry submits that Record 4, entitled "A Review of the Biological and Conservation Implications of Game Farming", is exempt from disclosure under section 18(1)(b) of the Act. This provision states that:

A head may refuse to disclose a record that contains,

information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

With its representations, the Ministry has provided an affidavit sworn by the author of Record 4 in which she states that, following an internal peer review of the document, she intends to publish it.

In order to qualify for exemption under section 18(1)(b), the Ministry must demonstrate that:

- (i) the record contains information obtained through research of an employee of the institution, **and**
- (ii) its disclosure could reasonably be expected to deprive the employee of priority of publication.

Based on my review of Record 4, I am satisfied that the document contains information obtained as a direct result of research undertaken by a Ministry employee. Further, I am persuaded that the employee intends to publish the document in an appropriate scientific forum and that the premature release of the record could reasonably be expected to deprive her of priority of publication. Accordingly, as both criteria for exemption have been satisfied, I find that Record 4 is properly exempt from disclosure under section 18(1)(b) of the Act.

PROPOSED POLICIES OF THE MINISTRY

The Ministry claims that the exemption contained in section 18(1)(g) of the Act applies to Records 1, 5, 6 and 7.

In order to qualify for exemption under this provision, the Ministry must establish that each record:

1. contains information including proposed plans, policies or projects; **and**
2. that disclosure of the information could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied.

I will turn first to the second part of the test. It has been established in a number of previous orders that the term "pending policy decision" contained in the second part of the test refers to a situation where a policy decision has been reached, but has not yet been announced. More specifically, the phrase does not refer to a scenario in which a policy matter is still being considered by an institution (Orders P-726 and P-790).

In its representations, the Ministry submits that "the exempted material consists of policy and program options, and recommendations on proposed programs and policies used to administer Bill 162". It goes on to add, however, that "the internal policy development process within the Ministry has not yet been completed."

Based on the evidence before me, I find that the Ministry has not yet decided to approve the policies and procedures set forth in Records 1, 5, 6 and 7. However, the exemption provided by section 18(1)(g) is available only in those situations where the records contain information relating to a decision which has been made, but not yet announced. By its own admission, the Ministry has not yet made a decision to implement one or more of the policies and programs described in the records. I find, therefore, that the undisclosed information contained in Records 1, 5, 6 and 7 cannot qualify for exemption under section 18(1)(g) of the Act.

Accordingly, with the exception of that information contained in pages 11, 12 and 60 of Record 6 which is exempt from disclosure under section 13(1), the remainder of Records 1, 5, 6 and 7 should be disclosed to the appellant.

ORDER:

1. I uphold the Ministry's decision to deny access to Record 4 in its entirety, and to those portions of pages 11, 12 and 60 of Record 6 which are highlighted on the copy of Record 6 provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose to the appellant Records 1, 5 and 7 in their entirety, as well as the contents of Record 6, with the exception of the highlighted portions of pages 11, 12 and 60 within fifteen (15) days of the date of this order.
3. I order the Ministry to advise the appellant in writing of the date of publication of Record 4 and the name of the publication in which it will appear.
4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2 and the

notification to the appellant required by Provision 3.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ December 7, 1994